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IN THE

Supreme Court of the United States

October Term 1974

No. 74-1425

WILLIAM STEINMAN,

Petitioner,

v.

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERVEY & LEGUM
Attorneys for Petitioner
AARON NUSSBAUM
Of Counsel
16 Court Street
Brooklyn, New York
Tel. (212) 237-1717

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IN THE SUPREME COURT OF THE UNITED STATES
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MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner William Steinman prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated April 14, 1975, affirming a judgment of the United States District Court for the Eastern District of New York, rendered on December 13, 1974, dismissing an action for a Declaratory Judgment and for injunctive relief against a pending state criminal prosecution, under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States, and 28 USC 1343(3).

OPINIONS BELOW

No opinion was rendered by the Court of Appeals.

The unreported memorandum opinions of the District Court, dated August 8, 1974 and December 6, 1974 respectively, are set forth in Appendix A of this Petition (denying application for a three-judge court (A-1—A-5); dismissing complaint for declaratory and injunctive relief (A 6-12).

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), 28 U.S.C. 1343(3) and the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States.

QUESTIONS PRESENTED

1. In entrapping and arresting Petitioner without ever arraigning him in a criminal court, did Petitioner suffer great and immediate irreparable injury by depriving him of the right to counsel and to a preliminary examination, during a critical stage of the proceedings against him?

2. Did Respondent Nadjari engage in a pattern of bad-faith enforcement of the state's criminal laws, by unconstitutional means, (a) by entrapping and arresting defendants on a wholesale scale, with no intention to arraign or prosecute them in a court of law, but to coerce and intimidate them by gestapo tactics into entrapping innocent judges, secretaries and other public servants into

the commission of crime; (b) by systematic state-manufactured criminality in the illegal deployment of undercover agents posing as "convicted" defendants in courts of law, involving wilful perjury, subornation of perjury and fraud and deception of grand juries, district attorneys and the courts, although Respondent had been repeatedly forewarned to desist therefrom by the state and federal courts; and (c) by systematically engaging in other prosecutorial misconduct shocking to the conscience, offensive to the rule of law and to the fundamental tenets of decency?

3. Was Petitioner deprived of all meaningful access to the state courts, and of a fair and sufficient opportunity for vindication of federal constitutional rights, where the state statute under which the Extraordinary Term of the Supreme Court was organized and convened was *facially* unconstitutional and void (*a*) as inherently violative of the independence of the judiciary and the Separation of Powers; and (*b*) as inherently violative of Petitioner's procedural rights to due process of law, and to the equal protection of the laws?

THE CONSTITUTIONAL PROVISIONS AND STATE STATUTES IN ISSUE.

Constitution of the United States

Fifth Amendment

"No person *** shall be *** deprived of life, liberty, or property, without due process of law ***".

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the

right *** to be confronted with the witnesses against him *** and to have the Assistance of Counsel for his defense."

Fourteenth Amendment

" *** nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATUTES OF THE UNITED STATES

United States Code

28 U.S.C. 1343 (3) Civil rights and elective franchise.

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress for equal rights of citizens or of all persons within the jurisdiction of the United States;"

New York State Constitution

Article 6. Section 27 New York State Constitution.

> "Section 27 (*Extraordinary Term of the Supreme Court*):
>
> The Governor may, when in his opinion the public interest requires, appoint Extraordinary

Terms of the Supreme Court. He shall designate the time and place of holding the term and the Justice who shall hold the term. The Governor may terminate the assignment of the Justice and may name another Justice in his place to hold the term."

Statutes of New York

Section 149. Judiciary Law.

"Section 149. Governor may appoint extraordinary terms and name justices to hold them.

1. The governor may, when in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term.***"

2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

Section 63 of the Executive Law

"Section 63. General Duties. The Attorney General shall:

"1. ***"

"2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement ***."

New York Criminal Procedure Law

Section 140.20. Arrest without a warrant; procedure after arrest by police officer.

1. Upon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording, fingerprinting and other preliminary police duties required in the particular case, must except as otherwise provided in this section, without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question.***".

Section 180.10. Proceedings upon felony complaint; arraignment; defendant's rights, court's instructions and bail matters.

1. Upon the defendant's arraignment before a local criminal court upon a felony complaint, the

court must immediately inform him, or cause him to be informed in its presence, of the charge or charges against him and that the primary purpose of the proceedings upon such felony complaint is to determine whether the defendant is to be held for the action of a grand jury with respect to the charges contained therein. The court must furnish the defendant with a copy of the felony complaint.

2. The defendant has a right to a prompt hearing upon the issue of whether there is sufficient evidence to warrant the court in holding him for the action of a grand jury, but he may waive such right.

3. The defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action, and, if he appears upon such arraignment without counsel, has the following rights:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purpose of obtaining counsel and informing a relative or friend that he has been charged with an offense; and

(c) To have counsel assigned by the court in any case where he is financially unable to

4. The court must inform the defendant of all rights specified in subdivisions two and three. The court must accord the defendant opportunity to exercise such rights and must itself take such affirmative action as is necessary to effectuate them.

5. If the defendant desires to proceed without

the aid of counsel, the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant is provided with counsel, either of his own choosing or by assignment. A defendant who proceeds at the arraignment without counsel does not waive his right to counsel, and the court must inform him that he continues to have such right as well as all the rights specified in subdivision three which are necessary to effectuate it, and that he may exercise such rights at any stage of the action.

6. Upon the arraignment, the court, unless it intends immediately thereafter to dismiss the felony complaint and terminate the action, must issue a securing order which, as provided in subdivision two of section 530.20, either releases the defendant on his own recognizance or fixes bail or commits him to the custody of the sheriff for his future appearance in such action.

Section 180.60. Proceedings upon felony complaint; the hearing; conduct thereof.

A hearing upon a felony complaint must be conducted as follows:

1. The district attorney must conduct such hearing on behalf of the people.

2. The defendant may as a matter of right be present at such hearing.

3. The court must read to the defendant the felony complaint and any supporting depositions unless the defendant waives such reading.

4. Each witness, whether called by the people or

by the defendant, must, unless he would be authorized to give unsworn evidence at a trial, testify under oath. Each witness, including any defendant testifying in his own behalf, may be cross-examined.

5. The people must call and examine witnesses and offer evidence in support of the charge.

6. The defendant may, as a matter of right, testify in his own behalf.

7. Upon request of the defendant, the court may, as a matter of discretion, permit him to call and examine other witnesses or to produce other evidence in his behalf.

8. Upon such a hearing, only non-hearsay evidence is admissible to demonstrate reasonable cause to believe that the defendant committed a felony; except that reports of experts and technicians in professional and scientific fields of the kinds specified in subdivision two of section 190.30 are admissible to the same extent as in a grand jury proceeding.

9. The court may, upon application of the defendant, exclude the public from the hearing and direct that no disclosure be made of the proceedings.

10. Such hearing should be completed at one session. In the interest of justice, however, it may be adjourned by the court but, in the absence of a showing of good cause therefor, no such adjournment may be for more than one day.

STATEMENT OF THE CASE

Petitioner's action for a Declaratory Judgment, pursuant to 28 USC 2201, alleged substantially as follows:

(a) The Respondent Nadjari, acting in concert with the Federal Strike Force of the United States Attorney for the Southern District of New York, where this case has originated under a manufactured federal jurisdiction, unlawfully and wrongfully ensnared and entrapped the Petitioner into the commission of the crimes alleged against him, resulting in his arrest on September 25, 1973.

Petitioner was subsequently indicted by indictment filed in the Supreme Court of the State of New York, Extraordinary Special and Trial Term, County of Kings, on December 19, 1973, charging him with the crimes of Conspiracy in the Third Degree, Attempted Bribery in the Second Degree, and Grand Larceny in the Second Degree, in violation of the penal statutes of the State of New York.

(b) Thereafter, Respondent Nadjari did grossly abuse his oath and authority by wilfully and wrongfully depriving Petitioner of an arraignment in a criminal court following his arrest, as required by law, and did wilfully deprive Petitioner of the constitutional protections of a Court, the right to counsel, the right to a preliminary examination, and the right to confrontation of the witnesses against him, at a critical stage of the proceedings against him.

(c) Instead, Respondent Nadjari, his agents and deputies, acting in concert with various agents of the United States Attorney for the Southern District of New York, unlawfully held the Petitioner virtually incommunicado from the date of his arrest, September 25. 1973 as aforestated, until approximately three months afterwards, for the ulterior and unlawful purpose and design to attempt to coerce and intimidate the Petitioner to entrap and ensnare various public servants within the criminal justice system of Kings County, State of New York, particularly "any" Justice of the Supreme Court of the State of New York, County of Kings, "any" Secretary

to a Justice, members of the District Attorney's Office of Kings County, and the United States Attorney's Office for the Eastern District of New York, and various other public servants, into the commission of bribery, perjury and other related crimes.

(d) In the execution thereof, the said Nadjari, his agents and deputies, acting in concert with other law enforcement officers as aforestated, did continuously warn and threaten the Petitioner not to divulge or reveal to anyone that he had been arrested or taken into custody, as aforestated, and further, did warn and threaten him that if he did not "cooperate" as aforestated, he would be "immediately" fingerprinted, booked and arraigned in a criminal court in connection with his arrest as aforestated, and further would suffer the loss of his pension as Administrative Assistant of the Comptroller's Office of the State of New York.

(e) During the course of the extraordinary prosecutorial misfeasance aforesaid, the Respondent Nadjari, did attempt to coerce the Petitioner to plant an illegal electronic eavesdropping device or "bug" in the headquarters of the Democratic County Committee of Kings County; and did further attempt to coerce him through a notorious professional entrapper, one Nicholas DiStephano, to ensnare and entrap certain named members of the judiciary within the criminal justice system of Kings County, and a named Judge of the Surrogates Court, into the commission of criminal acts; to entrap and ensnare a named Congressman into the commission of an act of bribery by the introduction of an Alien Bill into Congress; to entrap a specifically designated Assistant District Attorney of Kings County to buy and pay for a Criminal Court Judgeship through a named political leader of Kings County.

In the presence and hearing of the Respondent's Police agents, the informant Nick DiStephano bluntly threatened Petitioner: *"They got me. I got you. Now you get them."*

(f) Further, in pursuance of the calculated plan and scheme to entrap innocent persons within the criminal justice system of Kings County into the commission of crimes as aforestated, the Respondent Nadjari, his agents, deputies and others acting in concert with him, without any sanction or authority in law whatsoever, contrived and systematically employed the device of a fictitious "arrest" and "conviction" of a Federal undercover agent to accomplish such purposes, and that in execution thereof, the Respondent did wilfully suborn perjury of various witnesses in testifying perjuriously in the criminal courts of the State of New York, and before the Grand Jury, and did further deceive Grand Juries, the District Attorney of Kings County, and the Supreme Court of the State of New York, County of Kings, with respect to the plea and sentencing proceedings in regard to the staged arrest and conviction of the Federal undercover "defendants" aforesaid.

(g) The Respondent Nadjari, his agents and deputies, in concert with other law enforcement agents aforestated, did falsely and fraudulently represent to the United States Court of Appeals in a criminal proceeding entitled *United States v. Archer*, 486 F.2d 670, decided July 12, 1973, rehearing denied September 26, 1973, and again to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, that the said manufactured device of a mock arrest and conviction of a Federal undercover "Defendant" had been expressly authorized, sanctioned and approved by Chief Judge Fuld of the Court of Appeals of the State of New York, whereas in truth and in fact, the said Chief Judge had never sanctioned or approved such practice, but rather, had in fact

explicitly declined to disapprove the same; and had in fact so specifically informed the Respondent, Nadjari, through his agents and deputies, long prior to the date of the entrapment and arrest of this Petitioner as aforestated.

(h) The Respondent Nadjari, his agents and deputies, acting in concert with law enforcement officers as aforestated, and in wilful defiance of the Court's plain admonition in *United States v. Archer*, supra, against the continued practice of "Government-induced criminality", did nevertheless, wilfully and wrongfully continue to employ such practices against, up to and including the date of the indictment, December 18, 1973.

(i) The Respondent Nadjari, did wrongfully and wilfully contrive to deprive Petitioner of his right to a fair and impartial trial, particularly as to his right to assert the affirmative defense of entrapment, by prejudicially asserting and disseminating in a widely-reported news conference pre-arranged by him together with the United States Attorney for the Southern District of New York, on December 19, 1973, publicly proclaiming that Petitioner had a criminal predisposition, whereas in truth and in fact, he had no criminal pre-disposition of any kind, and had never been involved in any act relating to bribery, larceny or any criminal act whatsoever.

(j) Again, the Respondent Nadjari, his agents and deputies, did, on successive dates thereafter, April 1st and April 2nd, 1974, seriously prejudice Petitioner's rights to a fair and impartial trial by further false and prejudicial publicity through the media regarding his alleged criminal pre-disposition, all directly violative of the Canons of Professional Responsibility promulgated by the American Bar Association in August 1969 dealing with "trial publicity", and in particular, directly violative of the order of the Appellate Division of the Second Judicial Depart-

ment dated January 25, 1974, specifically directing the sealing of all records pertaining to the criminal case pending against him; all grossly violative of the Petitioner's rights to due process of law under the Fifth and Fourteenth Amendments of the Constitution.

By reason of the facts aforestated, the Respondent Nadjari, individually and as Deputy Attorney General of the State of New York, has so grossly abused his authority and jurisdiction under the color of the Governor's Executive Order No. 58 aforestated, that he, his agents and deputies, and all others acting in concert with him, have thrust themselves into direct violation of the penal statutes, both state and federal, as follows: Criminal Solicitation (Penal Law, Section 100.00); Coercion in the First Degree (Penal Law, Section 135.60); Conspiracy to Commit Bribery in the Third Degree (Penal Law, Section 105.05); Attempted Eavesdropping, (Penal Law, Section 250.05); Official Misconduct (Penal Law, Section 195.00); Conspiracy to Commit Perjury in the First Degree (Penal Law, Section 210.15); Conspiracy to Commit Perjury in the Second Degree (Penal Law, Section 210.10); Criminal Impersonation (Penal Law, Section 190.25); Deprivation of rights under color of law (Title 18 United States Code Section 242); Conspiracy against rights of citizens (Title 18 United States Code Section 241); among others.

The prosecutorial misconduct of the Respondent Nadjari, his agents and deputies and the law enforcement agents acting in concert with him, as aforestated, under color of the penal statutes of the State of New York and Executive Order No. 58, is so shocking to the conscience, and offensive to the canons of decency, and so violative of principles of fundamental fairness and a universal sense of justice, that the Court should bar the Respondent Nadjari from invoking judicial processes to

prosecute the indictment obtained against this Petitioner, and to dismiss the indictment in the interests of justice, in order to protect the integrity of the administration of criminal justice, to preserve the purity of the Courts, and to protect the citizen, and particularly this Petitioner, from the lawless and unconscionable conduct of law enforcement officers.

The Petitioner has no adequate remedy at law in the state courts to redress the deprivation of his constitutional rights, or to prevent the irreparable injury to him, except by way of an injunction, pursuant to Title 28 United States Code, Sections 2281 and 2284, to stay the prosecution, and for a declaratory judgment to declare the indictment against him null and void under the Fifth and Fourteenth Amendments of the Constitution.

In a supporting affidavit for a three-judge Court, Petitioner further alleged substantially as follows:

The trial of the indictment and all pre-trial proceedings relating thereto are now pending before the Hon. John M. Murtagh, Justice of the Supreme Court, appointed by the Governor of the State of New York, under color of Section 149, of the Judiciary Law, and of Article 6, Section 27 of the New York State Constitution, which provided as follows:

> "Sec. 27. Extraordinary terms of the Supreme Court.
>
> The Governor may, when in his opinion the public interest requires, appoint extraordinary terms of the Supreme Court. He shall designate the time and place of holding the term and the justice who shall hold the term. The Governor may terminate the assignment of the justice and may name another justice in his place to hold the term."

"Section 149. Governor may appoint extraordinary terms and name justices to hold them.

1. ***

2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

In pursuance therewith, the Honorable J. Irwin Shapiro, Associate Justice of the Appellate Division of the Supreme Court, Second Judicial Department, granted an order on January 25, 1974, authorizing Petitioner to bring the following preliminary motions, among others, directly before a term of the Appellate Division.

1) For an order dismissing the indictment in the furtherance of and in the interest of justice, under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and Art. 1, Sec. 6 of the New York State Constitution.

2) For an order pursuant to Section 210.20 subdivision 1(h) of the Criminal Procedure Law dismissing the indictment on the specific ground that Nadjari had grossly abused and violated the jurisdictional scope of his statutory power and authority vested in him through *Article VI, Section 27 of the Constitution of the State of New York, Section 63 of the Executive Law* and *Governor's Executive Order no. 58* dated September 19, 1972, and the due process clause of the Constitution.

3) For an order superseding and disqualifying Nadjari and any member of his staff, from managing and con-

ducting the further prosecution of Petitioner, and for an order requesting the Governor and/or the Attorney General of the State of New York to supersede the said NADJARI as Special Prosecutor therein.

4) For an order disqualifying Hon. John M. Murtagh, presiding justice of the Extraordinary Special and Trial Term from presiding at the trial of the action herein, if any, and staying the trial of this action until the appointment of another Justice in his place, or the designation of an additional Extraordinary and Special Trial Term by the Governor pursuant to specific authorization contained in *Article VI. Section 27 of the New York State Constitution* and *Section 149 of the Judiciary Law* and the due process clause of the Constitution.

On May 20, 1974, the Appellate Division rendered its decision, denying Petitioner's various motions to dismiss the indictment on due process grounds for prosecutorial misconduct, to supersede and disqualify the Respondent Nadjari, and to disqualify Judge Murtagh from presiding at the trial of the Petitioner.

In adopting the concurring opinion of Mr. Justice Shapiro in a companion case, *Matter of Klein v. Murtagh*, 44 App. Div. 2d 465, decided therewith, the Appellate Division stated:

> "*** in dismissing the petitions we have not reached or passed upon the petitioners' contention that the lawless conduct of the investigators in this case is so offensive to the administration of justice and to prevailing standards of decent behavior that this prosecution should be barred.
>
> While I am in general agreement with the disapproval voiced by Judge Friendly in *United States v. Archer* (486 F 2d 670) of the prosecutorial

conduct of the Government (both State and Federal), the question of whether such conduct constituted government induced criminality (*Sherman v. United States*, 356 U.S. 369), or was otherwise of such a nature as to violate principles of fundamental fairness sufficient to preclude the prosecution of the petitioners (*Rochin v. California*, 342 U.S. 165), or whether the indictment should be dismissed in the interest of justice (CPL 210.40), should be decided at the trial level on a full record containing all the essential facts showing the manner in which the events leading to the prosecution of the petitioners were planned and carried out. The determination of these questions cannot properly be made on an application for an order in the nature of prohibition."

Petitioner contended in the District Court below that he had suffered great and immediate irreparable injury by reason of the shocking prosecutorial misconduct aforesaid, and that he had no meaningful access to the state courts, for the following reasons:

- *Section 149, subd. 1 Judiciary Law*, under and by which the Extraordinary Term of the Supreme Court was organized and convened, was *facially* unconstitutional in that it was inherently violative of the independence of the judiciary, and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution.

- It was inherently violative of Petitioner's fundamental right to due process and the equal protection of the laws, (*Judiciary Law, Sec. 149, subd. 2*), in that it substantially diminished the procedural due process rights

of all criminal defendants before the Extraordinary Term of the Supreme Court, as compared to all other defendants before the regularly constituted criminal terms of the Supreme Court. (cf. *People ex rel. S.L. & T. Co. v. Extraordinary Term of Supreme Court*, 220 NY 487 (1917), opinion Cardozo, J.; *Matter of Reynolds v. Cropsey*, 241 NY 389.

• By hand-picking his own Special Prosecutor to manage and conduct all proceedings in the court so controlled by the Executive as aforesaid, the Governor has not only magnified manifold the potential dangers of *Section 149 Judiciary Law* to the independence of the judiciary and to the due process rights of an accused, but has likewise rendered *Section 63 Executive Law* and *Executive Order No. 58* issued thereunder, unconstitutional and void, as applied, under the Due Process Clause of the Constitution.

In this connection, Petitioner formally notified the District Court that there was now pending in the State courts an independent action instituted by Petitioner for a Declaratory Judgment to declare the said statute and constitutional provision unconstitutional and void, upon their face, and as applied, under the Due Process Clause of both the federal constitution, and the Constitution of the State of New York, Act 1, Sec. 6. That action is now pending in the Appellate Division of the Supreme Court, Second Judicial Dept., State of New York (*Steinman v. Nadjari*).

• The Respondent's wilful deprivation of Petitioner's right to counsel and to a preliminary examination, during a critical stage of the criminal proceedings against him, caused him great and immediate irreparable injury in his fundamental rights to a fair trial. (*Coleman v. Alabama*, 399 U.S. 1).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

POINT I

THE EXTRAORDINARY PROSECUTORIAL MISCONDUCT CONCLUSIVELY ADDUCED AT BAR WARRANTED EQUITABLE INTERVENTION FOR FEDERAL DECLARATORY AND INJUNCTIVE RELIEF, UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

The tests of "special circumstances" and "irreparable injury" laid down in the guiding precedent of *Younger v. Harris*, 401 US 37, 45, have been amply met in the conclusively documented allegations of extremely shocking prosecutorial misconduct set forth in Petitioner's action for a Declaratory Judgment in the District Court below.

Rarely in all prosecutorial experience in this country has "the ignoble shortcut to conviction" (*Mapp v. Ohio*, 367 US 643, 660) descended to the levels enumerated here, enveloping the very integrity of the judicial process and the administration of criminal justice.

Seldom in all the annals of criminal jurisprudence has a prosecutor so flagrantly abused the lawful limits of power and authority as in the case at bar.

In a multiple layer of entrapment and state manufactured criminality systematically practiced by the respondent Nadjari, (a) he entrapped the petitioner, with no intention to prosecute him, provided he would "co-operate"; (b) he attempted to coerce and terrorize the entrapped Petitioner by threat and terror, to entrap others; (c) he wilfully

deprived Petitioner of his constitutional right to any arraignment whatsoever, during a critical stage of the criminal proceedings against him (*Coleman v. Alabama*, 399 U.S. 1);; (d) he deliberately committed wholesale perjury and did suborn perjury in the criminal courts and grand juries through the manufactured device of pseudo-arrests and pseudo-convictions of undercover "defendants" for the purpose of entrapping others, without any authority or sanction of law whatever; (e) he falsely represented to the courts that he had received the express authorization, sanction and approval of the Chief Judge Stanley H. Fuld for the deployment of staged arrests and fake convictions, when in truth and in fact, he had no such permission, and indeed, Judge Fuld had explicitly rejected Nadjari's specific request for approval or sanction of such tactics in April, 1973; and (f) he systematically disseminated grossly false and seriously prejudicial publicity against the Petitioner regarding his alleged, but non-existent predisposition to crime, in flagrant violation of the Code of Professional Responsibility promulgated by the American Bar Association.

The totality of these conclusively documented practices, amply meets the test of "extraordinary circumstances" (*Younger v. Harris, supra*); "unusual situations", (*Samuel v. Mackell*, 401 U.S. 66, 67); and "bad faith enforcement or other special circumstances" (*Steffel v. Thompson*, 415 U.S. 452, 460), causing irreparable injury both great and immediate, and warranting federal intervention by declaratory and injunctive relief.

In *Russell v. United States*, 41195/23, Mr. Justice Rehnquist expressed the following caveat, 411 U.S. at p. 431, namely, that the Court might:

"some day be presented with a situation in which

> the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 US 165, 72 S. Ct. 205, 96 L. ed. 183 (1952) . . . "

We earnestly submit to the Court that the case at bar presents precisely such a situation.

It is significant that the Respondent's actions in the name of the law have already begun to merit the sharp rebuke of the federal and state courts.

In *United States v. Archer*, 486 F. 2d 670 (CA 2), in a setting of manufactured criminality identical as at bar — indeed, involving the very same prosecutor, the same police agents, and the same informant — the Court stated:

> "We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any prosecutorial role and needlessly injected the Federal government into a matter of state concern."

As to the entrapment issue, the Court pointedly added:

> " . . . Our intuition inclines us to the belief that this case would call for application to Mr. Justice Brandeis' observation in *Olmstead*, even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime.***
>
> Since we conclude reversal to be required on

another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part."

In *the Matter of Salvatore Nigrone*, the Appellate Division of the Second Department, 46 AD 2d 343 (1974), once again condemned this practice, as did the Archer Court, and declared as follows:

> "The deception of grand jurors, Judges and Assistant District Attorneys and the filing of false official documents are absolutely intolerable. *** When, as here, the criminal justice system is made an unwitting accomplice of an overzealous prosecutor, before the fact, its impartiality is destroyed and contempt for the law encouraged. ****
>
> Though the purpose of the Special Prosecutor may be laudatory, he is not above the law and may no more resort to corruption and manipulation of the criminal justice system than the individual he seeks to prosecute."

Mr. Justice J. Irwin Shapiro, in an opinion holding that the indictment should be dismissed under the Due Process Clause, further held:

> "The myopic view of the Special Prosecutor with regard to his conduct destroys the contention of the majority that we have here a *sui generis* case and that its condemnation 'will suffice to prevent its repetition'. In this connection it should be remembered that almost exactly the same kind of conduct was severely condemned in *United States v. Archer* (486 F.2d 670), a case in which the

Special Prosecutor here participated as amicus curiae.*****

A dismissal of the indictments here would not hamper proper investigative procedures, but would serve notice that *Javert* type techniques which utterly disregard basic constitutional rights, violate statutory law and constitute an intrusion on those rights which we as a free people hold most dear may not be perpetrated with impunity. We must set our face unalterably against lawless law enforcement as a proper device to be used by prosecutors even if their motives be of the best—for sanctioning them can only have a chilling effect on proper law enforcement and result in the eventual erosion of many of our basic constitutional rights."

"The requirement of due process *** extends to the pretrial conduct of law enforcement authorities." (*United States v. Toscanino*, 500 F 2d 267, 274 (CA 2, 1974).

The U.S. Court of Appeals for the D.C. Circuit, *en banc*, on Dec. 12, 1974, in *United States v. McCord*, 509 F2d 334 said:

"*** we have no doubt that McCord's most general assertion of principle is grounded in respectably authority: i.e. serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial without regard to prejudice to the accused."

In dismissing Petitioner's action for a Declaratory Judgment and for a 3-Judge Court, the District Court erroneously held that:

"When what in substance being challenged is neither a statute, nor the policy underlying the statute, rather the activities of a state officer

appointed under the authority of the statute, resort to a three-judge court is inappropriate (cases cited)." (A-4).

The indisputable fact is, however, that the prosecutorial misconduct of the Respondent Nadjari depicted at bar reflected a systematic policy affecting not only this Petitioner, but a host of others similarly situated.

The sinister tactic of incommunicado arrest for the purpose of ensnaring and entrapping others has been a standard policy of Respondent Nadjari in several reported cases, several of which have already surfaced in the public notoriety. Among those involved at least one member of the Bar of Kings County, a former Law Secretary to a Justice of the Supreme Court in the County of Kings, who were likewise arrested without ever having been arraigned in a court of law, and surreptitiously "wired" to entrap judges and others within the criminal justice system, and, among others, an elected judge of the Civil Court, New York County, who though actually arrested, was likewise never formally arraigned in a court of law, but immediately pressed into service as a wired informant for the Respondent.

POINT II

PETITIONER HAS BEEN IRREPARABLY INJURED IN THAT HE HAS BEEN UTTERLY DEPRIVED OF AN ADEQUATE REMEDY AT LAW AND OF ALL MEANINGFUL ACCESS TO THE STATE COURTS.

The prerequisite showing of great and immediate irreparable injury to Petitioner, "resulting in a deprivation of meaningful access to the state courts" (*Allee v. Medrano*, 416 US 802, 94 S.Ct. 2191, 2210 (1974), was here conclusively established, in four-fold respect as follows:

A.

The Total Denial of Counsel, Arraignment or Right to Preliminary Examination

Petitioner was intentionally deprived of the right to counsel during a critical stage of the proceedings against him, and the right to a preliminary hearing. In utterly depriving him of these elementary rudiments of due process, petitioner's indispensable fundamental rights to a fair trial have been irretrievably lost. The full measure of that loss is delineated in *Coleman v. Alabama*, 399 US 1, wherein the Court stated:

> "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case, that may lead

the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial.

Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail. The ability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid (of counsel as at the trial itself. Powell v. Alabama, supra, at 57, 53 S Ct at 60."

New York Criminal Procedure Law Sec. 140.20 requires that a police officer

> "upon arresting a person without a warrant must *** without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question."

New York Criminal Procedure Law, Sec. 180.70 subd. 4, provides:

> "If there is not reasonable cause to believe that the defendant committed any offense, the court

must dismiss the felony complaint and discharge the defendant from custody if he is in custody, or, if he is at liberty on bail, it must exonerate the bail."

Under *Section 180.60 of the New York Criminal Procedure Law*, each witness at the preliminary hearing, whether called by the people or by the defendant, may be cross-examined; a defendant may, as a matter of right, testify in his own behalf; and, upon his request, the court may permit him to call and examine other witnesses or to produce other evidence in his behalf.

By wilfully depriving Petitioner of a preliminary hearing altogether, the Respondent foreclosed him from establishing that there was no "reasonable cause to believe that he committed a felony". Manifestly, had such hearing been had, Petitioner would have had the opportunity to prove, and would have proved, through electronic tapes in Respondent's possession or control, of all conversations with the informant, that Petitioner had been indeed entrapped, as a matter of law, and that probable cause for his arrest was lacking. (*Gerstein v. Pugh*, ———US——— (1975); *New York Penal Law* Sec. 40.05; *Pitler, New York Criminal Procedure Law*, pp. 204-209; *Coleman v. Burnett*, 477 F 2d 1187 (CA5, 1973); *United States v. King*, 482 F 2d 768 (CA, DC, 1973).

It will be noted that nowhere in the opinion of the District Court below did it even consider or evaluate the great or immediate irreparable injury to Petitioner posed by the failure to accord him the right of counsel, or of a due arraignment in a court of law, during a critical stage of the proceedings against him under the *Coleman* standard of due process.

Indeed, flatly contrary to the teachings of *Coleman*, the

Respondent misleadingly contended in the Court below, as follows:

> "The right to a prompt preliminary hearing or arraignment is a state, not a federal, right. (*Resp. Brief in Support of Motion to Dismiss*).

Nor did the District Court even consider the facial unconstitutionality of the statutes bearing directly on the crucial issue whether Petitioner had meaningful access to the State Courts, or a fair opportunity to vindicate his federal constitutional rights (*Younger v. Harris*, 401 US 37; *Kugler v. Helfant*,—US—, April 28, 1975, 17 Cr L 30007).

B

The Facial Unconstitutionality of the Statute Directly Affecting the Independence of the Judiciary.

Above all, the state prosecution at bar is fatally infected with a statute unconstitutional *on its face*, going to the very jurisdiction and competence of the Court, in two-fold respects, as follows:

(A). It is inherently violative of the independence of the judiciary; (*Judiciary Law, Sec. 149, subd. 1*)

(B). It is inherently violative of an accused's right to due process and the equal protection of the laws (*Judiciary Law, Sec. 149, subd. 2*] in that it substantially diminishes the rights of all litigants before the Extraordinary Term of the Supreme Court, as compared to all other defendants in the regular Criminal Terms of the Supreme Court. (cf. *People ex rel. S.L. & T. Co. v. Extraordinary Term of Supreme Court*, 220 NY 487 (1917), opinion Cardozo, J.; *Matter of Reynolds v. Cropsey*, 241 NY 389 (Appendix, pp. 94-96)

In the absolute power vested in the Governor to appoint *and to remove at will*, any judge designated by him to hold the extraordinary special and trial term of the supreme court, both *Article 6, Section 27 of the New York State Constitution* and *Section 149 of the Judiciary Law* are unconstitutional and void, on their very face, as inherently violative of the independence of the judiciary, and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, Section 6 of the New York State Constitution.

The settled law is that a provision in a state constitution is subject to the same statutory rules of construction, consistent with the due process clause of the federal constitution, as any state statute.

In *Matter of Wendell v. Lavin*, 246 NY 115, 123, the Court of Appeals declared:

> "The same rules apply to the construction of a Constitution as to that of statute law. (*People ex rel Jackson v. Potter*, 47 N.Y. 375, pp. 379-380".
>
> Accord: *Newell v. People*, 7 NY 9.

The fatal flaw of the statute and constitutional provision in issue is *that in its in-built potential of control by the Governor over any judge appointed by him it is inherently violative of the independence of the Judiciary.*

The cardinal principle laid down by this Court, of long vintage, is that the constitutionality of a measure depends not on the degree of its exercise but on its principle. (*Providence Bank v. Billings*, 29 U.S. 514, 7 L Ed. 939).

In *Stuart v. Palmer*, 74 N.Y. 183, 189, the New York Court of Appeals long ago followed the same seminal test of constitutionality:

> "The constitutional validity of law is to be tested, not by what has been done under it, but by what

may, by its authority, be done."

Again, in *Rosalsky v. State*, 254 NY 117 (1930), the Court stated:

> "We measure the validity of statutes, not by what has actually been done under cover of their provisions, but by what with reason may be done. Stuart v. Palmer, 74 N.Y. 183, 30 Am. Rep. 289; Matter of Richardson, 247 NY 401, 421, 160 NE 655."

In *People v. Klinch Packing Co.* 214 N.Y. 121, 138-139 (1915), the Court reiterated the applicable rule:

> " . . .we are to judge of a statute by what is possible under it, in the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very falliable in the execution of them."

Directly pertinent is this Court's decision in *Dreyer v. Illinois*, 187 U.S. 71, where Mr. Justice Harlan stated at page 84:

> "'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensible to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distince, and have no common link of connection or dependence, the one upon the other, in the slightest degree. *The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.* Story's Const. (5th ed.) 393 ..." (Emphasis supplied.)

The doctrine of Separation of Powers in our constitutional system of government by checks and balances is a "bulwark against tyranny" (*United States v. Brown*, 381 US. 437 (1965).

Accord: (*O'Donohue v. U.S.* 289 US 516; *Kilborne v. Thompson*, 103 U.S. 168, 190; *Springfield v. Philippine Islands*, 177 U.S. 189, 201; *Federalist Papers* No. 47, 48, 51.)

The gravely pernicious potentials of the statute in issue are readily apparent.

The independence of the judiciary is automatically subjugated to the control, whim and caprice of the Executive. The power to hire and fire a judge puts the Executive implacably "in control of judicial action" (*People ex rel S.L. & T. Co. v Extraordinary Term* 220 NY 487.)

A judge so compromised would be inevitably impelled to tilt the balanced scales of justice against any accused—if only to curry the favor on the one hand, or avert the retribution of the Governor, on the other. In a court of justice so heavily stacked against the accused, with the Governor holding the strings of both the judge and prosecutor, the elemental rights to a fair trial are hopelessly compromised. No judge so situated could reasonably maintain the balance true, despite the best of intentions and the highest nobility of motive.

To expect any judge or Court, so situated, to maintain an even balance of judicial objectivity under these unique and extraordinary circumstances, would be to strain for the fulfillment of the impossible from any human being.

Even far beyond its mere potential, the unprecedented imperial power vested in the Governor by *Section 149 of the Judiciary Law* has inevitably tended to invite, encourage and generate the very tyrannical abuses practiced by the

respondent at bar, not only against this Petitioner, but against all others similarly situated, as reflected in a proliferating number of reported cases.

It is no mere coincidence that of all those indicted by the Respondent Nadjari under color of these statutes and the Governnor's Executive Order issued thereunder, an abnormal number of those charged have interposed defenses charging wilful entrapment, failure to arraign defendants in a criminal court, gross prosecutorial misconduct violative of due process, gross abuse of jurisdication, outrageous and unfair trial tactics, and "perversion of the criminal justice system of an overzealous prosecutor" (*See Matter of Nigrone*, 46 AD 2d 343) (2d Dept., 1975); *People v Bell*, 45 App. Div. 2d 362 (1st Dept. 1974); *People v. Harding*, 44 App. Div. 2d 800 (1st Dept. 1974); *People v. Rao*, 46 App.Div.2d 343 (2d Dept. 1975); *United States v. Archer*, 486 F.2d 670 (CA 2); *Matter of Klein v. Murtagh*, 44 App.Div.2d 465 (2d Dept., aff. 34 NY 2d 988); *People v. Steinman*, 44 App.Div.2d 839 (2d Dept., 1974); *People v. Levy*,—App Div. 2d—(2d Dept., 1975); *Matter of Moritt v. Nadjari*, 46 App.Div. 2d 784 (2d Dept.).

With the utmost deference and respect for the Judge presiding over the Extraordinary Term, the recent decision by the Appellate Division of The Supreme Court, First Department, in *People v. Bell*, supra (July 9, 1974), unanimously reversing a judgment of conviction obtained by the respondent Nadjari in the Extraordinary Term of the Supreme Court, is highly illustrative of the inadvertent psychological pressures operative against a fair trial for any accused in the Court constituted under the unconstitutional statutes here in issue.

There, reversing a conviction of a police officer for Attempted Possession of a Dangerous Drug in the First Degree, Burglary in the First Degree and Attempted Grand

Larceny in the Second Degree, with concomitant sentence of six to eighteen years in prison, the Appellate Division held:

> "On this record, it is clear that the totality of the trial court's errors was prejudicial and, in effect, denied defendant-appellant Richard Bell a fair trial. . . .
>
> 'Read as a whole, the charge was prejudicial in that it appeared to emphasize the strength of the prosecution's case, in derogation of the requirement to give balanced instructions to the jury in a criminal trial. . . ."

Of the same tenor, see *People v. Levy,* ———*AD2d*——[*2d Dept. Feb. 24, 1975*] *People v. Johnson,* ———AD 2d———(1st Dept. 1974), 361 NYS 2d 921, 926; *People v. Harding,* 44Ad 2d 800 (1st Dept.); *People v. Mackell*——Ad 2d———(2nd Dept. 1975); *Matter of Nigrone* 46 AD 2d 343 (2d Dept. 1974).

In the light of the unconstitutional statutes aforesaid, the District Court plainly erred in holding that "Plaintiff has a forum where he can assert these due process violations."

To relegate Petitioner to a trial before the Judge presiding in the Extraordinary Term, be it Judge Murtagh or any other designee of the Governor, would be patently prejudicial to his procedural rights of due process, and to his constitutional right to a fair and impartial trial.

Indeed, a resolution of the critical issues propounded by the Petitioner, engendered by the extraordinary prosecutorial misconduct shown at bar, would necessarily require the Court to pass value judgments upon such subjective pre-trial issues as the pending motions therein (A) to disqualify the Respondent as the prosecutor in this case, upon the ground that neither this Petitioner nor any other defendant could get a fair trial at his hands under the

shocking misconduct already evidenced at bar; (B) to dismiss the indictment under the Due Process Clause of the Constitution as a judicial sanction to protect the integrity of the judicial process and the rule of law; (C) to dismiss the indictment for Respondent's gross abuse of jurisdiction in the systematic manufacturing of crime in order to prosecute it; (D) to disqualify Judge Murtagh; and (E) to rule on the very constitutionality of the statutes upon which the court itself is legally structured.

In net effect, by relegating Petitioner to seek redress of his federal constitutional rights before the Judge presiding over the facially unconstitutional Extraordinary Term, and more particularly, for a special ruling on the constitutionality of the statutes under the Separation of Powers doctrine, would implicate the presiding Judge in an untenable situation in which he, in effect, would be called upon to invalidate the very Court over which he presided.

Indeed, if Petitioner's contention as to the facial unconstitutionality of the statute is valid, then the Extraordinary Term of the Supreme Court is utterly without power or competence even to resolve that issue, or any other, as an illegally constituted court.

In re Murchison, 349 U.S. 133 (1965), the Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. ***But our system of law has always endeavored to prevent even the probability of unfairness.*** To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. ***Circumstances and relationships must be considered. This Court has said, however, that every procedure which would***

offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 71 L. ed. 749, 758, 47 S. Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L. ed. 11, 75 S. Ct. 11." (emphasis ours.)

In *United States v. Walker,* 473 F 2d 136 (CA, DC. 1972), the Court noted:

"The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious."

C

The State Statute Seriously Diminished the Rights Of All Litigants, And Is Facially Violative of the Equal Protection Clause of the Fourteenth Amendment.

Gravely compounding the dangerous potentials of this King George-III type statute wholly destructive of the independence of the judiciary, the legislature concomitantly whittled away the fundamental rights of an accused to procedural due process of law.

Every litigant before the Extraordinary Term, is automatically forfeit to severely diminished rights in the determination of critical pre-trial motions and proceedings, in utter denial of their due process rights to the equal protection of the laws. (See *People ex rel. S.L. &*

T. Co., v. Extraordinary Term. 220 N.Y. 437, opinion by Judge Cardozo; *Dreyer v. Illinois.* 187 U.S. 71, 84.). Thus:

Originally, a defendant had the absolute right to present any pre-trial motion to the Special Term of the Supreme Court, rather than to the Extraordinary Term, as all other defendants in the regularly constituted criminal terms.

As originally construed by New York's highest court, the Extraordinary Term when created "became a term of the Supreme Court with the same jurisdiction that belongs to any other term." (*Matter of Reynolds v. Cropsey, supra*). "It does not enlarge or diminish the rights of litigants,,,,No such interpretation is thinkable." (*People ex rel. SL & T Co.*. 220 NY 487 (1917), per Judge Cardozo.

However, subsequent thereto, the legislature added a new subdivision (L. 1960, ch. 164) massively diminishing the rights of litigants, reading as follows:

> "2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

Thus, under the facially unconstitutional statute aforesaid, petitioner and all others similarly situated are rigidly restricted to the Extraordinary Term alone for vindication of their rights of due process to a fair and impartial trial, save only for the limited right to apply to the Appellate Division with respect to preliminary matters, subject however, to the over-all discretionary right of a justice of the Appellate Division to grant or withhold such

permission (*Section 149, subd. 2, Judiciary Law*).*

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (*Roller v. Holly*, 176 U.S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410) Accord: *Coe v. Armour*, 237 U.S. 413, 424-5; *Wuchter*, 276 U.S. 13, 24.

A defendant before any regular term of the Supreme Court, however, would have the absolute right to move at general Criminal Term for disqualification of a judge, for a change of venue, or for dismissal of the indictment on due process grounds where, such as here, it is "required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or court would constitute or result in injustice." (*New York Criminal Procedure Law, Sec. 210.40*). Here, Petitioner had no such rights.

Again, in stark contrast to the severe limitations and restrictions imposed on all litigants with respect to pre-trial proceedings in the unconstitutional Extraordinary Term, the recently amended CPL 255.20 (L. 1974, Ch. 763, eff. Sept. 1, 1974), dealing with pre-trial omnibus motions generally, provides as follows:

> "All pre-trial motions, with supporting affidavits affirmations, exhibits and memoranda of law, whenever practicable, shall be included within the same set of motion papers, and shall be made returnable on the same date, *unless the defendant shows that it would be prejudicial to the defense were a single judge to consider all the pre-trial motions.....*" (Empahasis ours)

* Indeed, as aforementioned, petitioner's motions for pre-trial relief had been duly addressed to the Appellate Division, but were relegated back to the Extraordinary Term of the Supreme Court for disposition.

Here, however, there is but a single solitary judge alone to whom petitioner may repair for redress of his constitutional rights, thus effectively depriving him of the equal protection of the laws.

D.

Section 63 of the Executive Law, and the Governor's Executive Order No. 58, As Applied, Is Violative of the Due Process Clause.

Section 63 of the Executive Law, implementive of and complementary to *Section 149 of the Judiciary Law* aforestated, provides in pertinent part as follows:

> "Section 63. *General Duties.* The Attorney General shall:
> "1. ...
> "2. Whenever required by the governor, *attend in person, or by one of his deputies,* any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement . . .." (Emphasis ours.)

By designating his own Special Prosecutor to manage and conduct all proceedings in the court so controlled by the Executive as aforesaid, the Governor has not only magnified manifold the potential dangers of *Section 149 of the Judiciary Law* to the independence of the judiciary and to the due process rights of an accused, but has likewise rendered *Section 63 of the Executive Law* and *Executive Order No. 58* issued thereunder, unconstitutional and void, *as applied*, under the Due Process Clause of the Constitution.

This court has held that "(w)e have not hesitated on direct review to strike down applications of constitutional

statutes which we have found to be unconstitutionally applied." (*Cameron v. Johnson*, 390 US 611; *Cox v. Louisiana*, 379 US 559; *Steffel v. Thompson*, 415 U.S. 452; *Allee v. Medrano*, 416 US 802, 815).

In sum, this Petitioner, as all others similarly situated before the Extraordinary Term, have been deprived of the substantive right to be tried by a judge randomly chosen. Instead, He is now compelled to stand trial before the Governor's personally hand-picked judge and hand-picked Special Prosecutor, both of whom are summarily removable at the instance, will, whim or caprice of the Executive.

A litigant at the bar of criminal justice before the Extraordinary Special and Trial Term of The Supreme Court is effectively deprived of the equal protection of the laws accorded all other criminal defendants in regularly constituted terms of the Supreme Court.

In net effect, therefore, the Petitioner has no meaningful access to the state court, or "fair and sufficient opportunity for vindication of federal constitutional rights." (*Kugler v. Helfant*, ——US——, April 28, 1975).

Directly applicable is *Perez* v. *Ledema*, 401 US 27, at p. 82, wherein the Court recently stated in a concurring opinion by Brennan, White and Marshall, JJ:

> "Where the ground is bad-faith harassment, intervention is justified whether or not a state prosecution is pending. Intervention in such good cases does not interfere with the normal good-faith enforcement of state criminal law by constitutional means, and does not necessarily require a decision on the constitutionality of a state statute. It simply prevents particular unconstitutional use of the State's criminal law in bad faith against the Federal plaintiff."

In *Allee v. Medrano*, 416 US 802, *supra*, the Court recently held:

> "Isolated incidents of police misconduct under valid statutes would not, of course, be cause for the exercise of a federal court's equitable powers. . . . Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate."

In *Kugler v. Helfant*, ———US———, April 28, 1975, 17 CrL 3007, *supra* the Court stated:

> "...the Court in *Younger* left room for federal equitable intervention in a state criminal trial where there is a showing of "bad faith" or "harassment" by state officials responsible for the prosecution, *id.*, at 55, where the state law to be applied in the criminal proceeding is "flagrantly and patently violative of express constitutional prohibitions," *id.*, at 53, or where there exist other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."

Measured squarely by these tests, the Respondent's persistent pattern of bad-faith prosecution and extraordinary misconduct, astride the facially unconstitutional statutes at bar, clearly warranted federal intervention of Declaratory and Injunctive Relief under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution, and the redress provisions of Title 28 U.S.C. 1343 (3).

Radically distinguishable from *Kugler v. Helfant, supra*, there is here no legally constituted Court under the patently unconstitutional Section 149 Judiciary Law of New York, both as to the total lack of independence of the judiciary,

and as to the intrinsic denial of Petitioner's elemental rights of procedural due process, as compared to all other defendants of the regularly constituted criminal terms.

Unlike Kugler, supra, there is here but a single, solitary judge alone—instantly removable by the Governor—to whom Petitioner is absolutely restricted for the redress of his federal constitutional rights to a fair and impartial trial, save only for the severely limited right to apply to a Justice of the Appellate Division for discretionary authorization to present pre-trial motions before such Court, thus denying to Petitioner the equal protection of the laws.

What is fundamentally at stake in the within Petition for a Writ of Certiorari is the "imperative of judicial integrity" (*Elkins v. United States,* 364 US 206, 222; *Terry v. Ohio,* 392 US 1, 12-13).

Entrapment, in and of itself, deeply offends "the highest public policy in the maintenance of the integrity of administration . . .It is abhorrent, to the sense of justice," declared Chief Justice Charles Evans Hughes, writing for the Court in *Sorrells v. United States*, 287 US 435, 446-8.

Further, said Mr. Justice Hughes:

> ". . .such an application (entrapment) is so shocking to the sense of justice that it has been urged that it is the duty of the Court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts."

As Mr. Justice Brandeis stated in his classic dissent in *Olmstead v. United States*, 277 US 438:

> "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . .. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

HERVEY & LEGUM
Attorneys for Petitioner,
Office & P.O. Address,
16 Court Street,
Brooklyn, New York 11241
212-852-2464

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AARON NUSSBAUM, of Counsel.